

DEPARTMENT OF STATE REVENUE

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**Letter of Findings Number:
04-20140365, 04-20140366, 04-20140367, 04-20140368
Sales Tax and
Prepaid Wireless Telecommunications Service Charge
For Tax Year 2010, 2011, and 2012**

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register.

ISSUES

I. Sales Tax - Liability.

Authority: IC § 6-2.5-2-1; IC § 6-8.1-5-1; IC § 6-8.1-5-4; Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); [45 IAC 2.2-2-1](#).

Taxpayer protests the imposition of additional sales tax.

II. Enhanced Prepaid Wireless Charge - Liability.

Authority: IC § 6-8.1-1-1; IC § 6-8.1-5-1; IC § 6-8.1-5-4; IC § 36-8-16.6-7; IC § 36-8-16.6-9; IC § 36-8-16.6-11(a); IC § 36-8-16.6-12; IC § 36-8-16.6-13; Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Commissioner's Directive 39 (May 2010); Commissioner's Directive 39 (June 2012).

Taxpayer protests the imposition of additional prepaid wireless telecommunications service charge.

STATEMENT OF FACTS

Taxpayer is a registered retail merchant that sells cell phones, cell phone plans, and cell phone accessories. Taxpayer operates two locations. The Indiana Department of Revenue ("Department") conducted an audit of Taxpayer that included both locations. As a result of the audit, the Department issued proposed assessments of additional sales tax, additional prepaid wireless telecommunications service charges, penalties, and interest. The Department imposed proposed assessments of additional prepaid wireless telecommunications service charges only for the tax years 2011 and 2012. Taxpayer protests the imposition of additional sales tax and additional prepaid wireless telecommunications service charges. An administrative hearing was held, and this Letter of Findings results. Additional facts will be provided as needed.

I. Sales Tax - Liability.

DISCUSSION

Taxpayer protests the proposed assessment of additional sales tax. All tax assessments are prima facie evidence that the Department's claim for the tax is valid, and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). The issue is whether Taxpayer met its burden to prove the assessment is incorrect.

Indiana imposes a sales tax on retail transactions made in Indiana, and the person who acquires property in a retail transaction is responsible for payment of the tax. IC § 6-2.5-2-1(a); [45 IAC 2.2-2-1](#). "The retail merchant shall collect the tax as agent for the state." IC § 6-2.5-2-1(b).

"Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4(a). Such records include "all source documents necessary to determine the tax" Id. If the Department cannot determine a taxpayer's liability and the Department reasonably believes that the taxpayer has not reported the

proper amount of tax due, the Department will propose an assessment of unpaid tax based on the best information available to the Department. IC § 6-8.1-5-1(b).

Taxpayer does not dispute that it is required to collect and remit sales tax, a listed tax. Pursuant to IC § 6-8.1-5-4(a), it must keep sufficient records for the Department to be able to determine the amount of Taxpayer's tax liability. The audit report indicated that "Taxpayer had been granted numerous chances to provide documentation." It noted, however, the documentation provided during the audit revealed "sales made in which no detail was provided on exempt sales." According to the report, Taxpayer identified "Income from Repairs" as an exempt category without providing detail about the transactions placed in this category. Additionally, for tax year 2012, "no documentation was received on the categorization of non-taxable sales," so the auditor used the information provided for tax years 2010 and 2011 to estimate the non-taxable sales for 2012. The auditor determined that the documentation provided was inadequate to calculate Taxpayer's sales tax liability and proposed an assessment of additional sales tax based on the best information available pursuant to IC § 6-8.1-5-4(a) and IC § 6-8.1-5-1(b).

During the protest process, Taxpayer provided additional documentation including copies of bank statements for each tax year at issue, Taxpayer's federal income tax returns for each tax year at issue, promotional materials, and email communications between Taxpayer and vendors regarding promotions. Taxpayer also provided copies of receipts or statements of its purchases of certain services and activation bonuses. Some of these documents were dated 2013 or 2014, outside the tax years at issue. In any case, the additional documentation does not provide sufficient detail regarding Taxpayer's non-taxable sales. Taxpayer did not provide contemporaneous documentation, such as receipts or invoices, showing the detail of purported non-taxable transactions included in its "Income from Repairs" category. The additional documentation is inadequate to determine the amount of Taxpayer's sales tax liability.

Taxpayer's books and records were insufficient, so the Department properly relied on the best information available to verify Taxpayer's sales and determine its tax liability. Although Taxpayer has provided additional documentation during the protest process, it has not met its burden to show that the proposed assessments are incorrect, and its protest is respectfully denied.

FINDING

Taxpayer's protest is respectfully denied.

II. Enhanced Prepaid Wireless Charge - Liability.

DISCUSSION

Taxpayer protests the Department's proposed assessment of additional prepaid wireless telecommunications service charge. All tax assessments are prima facie evidence that the Department's claim for the tax is valid, and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012). The issue is whether Taxpayer met its burden to prove the assessment is incorrect.

Indiana imposes an enhanced prepaid wireless charge on the purchase for any purpose other than resale of prepaid wireless telecommunications service from a seller. IC § 36-8-16.6-9; IC § 36-8-16.6-11(a). Prepaid wireless telecommunications service "means a prepaid wireless calling service (as defined in IC [§] 6-2.5-1-22.4) that allows a user of the service to reach emergency services by dialing the digits nine (9) one (1) one (1)." IC § 36-8-16.6-7.

A seller is required to collect the enhanced prepaid wireless charge from its customer each time it sells prepaid wireless telecommunications services. IC § 36-8-16.6-12(a). The person who buys prepaid wireless telecommunications services is liable for the enhanced prepaid wireless charge but "a seller is liable to remit to the department all enhanced prepaid wireless charges that the seller collects from consumers . . . including all charges that the seller is considered to collect where the amount of the charge has not been separately stated on an invoice, receipt, or other similar document provided to the consumer by the seller." IC § 36-8-16.6-13. The seller is required to remit the enhanced prepaid wireless charge to the Department. IC § 36-8-16.6-12(c).

Commissioner's Directive 39 instructs sellers of prepaid wireless telecommunications services regarding the enhanced prepaid wireless charge:

SELLER RESPONSIBILITIES

A seller is required to collect the charge from the consumer with respect to each retail transaction and to disclose to the consumer the amount of the charge. The seller may separately state the amount of the charge on an invoice, a receipt, or a similar document that the seller provides to the consumer. If the seller does not separately state the amount of the charge on an invoice, a receipt, or a similar document, the seller is still required to remit to the Department the charges collected from the consumer.

A seller is required to remit the charges collected to the Department on the same date that the seller's sales tax return is due. The seller shall report and remit the charges collected using the Department's online tax filing program (INTax). A seller can register for INTax by going to www.intax.in.gov.

Commissioner's Directive 39 (May 2010), 20100526 Ind. Reg. 045100329NRA; see also, Commissioner's Directive 39 (June 2012), 20120627 Ind. Reg. 045120369NRA.

As previously outlined, "every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4(a). Such records include "all source documents necessary to determine the tax" Id. If the Department cannot determine a taxpayer's liability and the Department reasonably believes that the taxpayer has not reported the proper amount of tax due, the Department will propose an assessment of unpaid tax based on the best information available to the Department. IC § 6-8.1-5-1(b).

The enhanced prepaid wireless charge is a fee that the Department is required to administer. Pursuant to IC § 6-8.1-1-1 fees required to be administered by the Department are listed taxes and subject to the provisions of IC § 6-8.1-5-4.

Taxpayer does not dispute that it is required to collect and remit the enhanced prepaid wireless charge, a listed tax. Pursuant to IC § 6-8.1-5-4(a), it must keep sufficient records for the Department to be able to determine the amount of Taxpayer's liability. The audit report indicated that "[T]axpayer remitted wireless prepaid for the audit period, however no documentation was provided for verification. [T]axpayer was given numerous opportunities to supply information." The auditor used "alternative measures . . . to determine the reasonableness of wireless prepaid remitted" The auditor compared the result with the actual amount remitted by Taxpayer. Because the comparison indicated that Taxpayer had not remitted the proper amount of enhanced prepaid wireless charge, the auditor adjusted it for both of Taxpayer's locations for the tax years 2011 and 2012.

Taxpayer provided additional documentation during the protest process. However, the additional documentation is insufficient to establish the actual amount of enhanced prepaid wireless charge required to be collected and remitted by Taxpayer.

Although Taxpayer has provided additional documentation during the protest process, it has not met its burden to show that the proposed assessments are incorrect. Taxpayer's documentation is insufficient to determine the amount of Taxpayer's liability, and the Department properly relied on the best information available, including alternative measures, to calculate Taxpayer's liability. Taxpayer's protest is respectfully denied.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's protest is respectfully denied on Issue I regarding additional sales tax. Taxpayer's protest is respectfully denied on Issue II regarding additional enhanced prepaid wireless charges.

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